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Nos. 95-1455 and 95-1508

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In the Supreme Court of the United States

OCTOBER TERM, 1995

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, APPELLANT

v.

BOSSIER PARISH SCHOOL BOARD

GEORGE PRICE, ET AL., APPELLANTS

v.

BOSSIER PARISH SCHOOL BOARD

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE FEDERAL APPELLANT

WALTER DELLINGER
Acting Solicitor General

DEVAL L. PATRICK
Assistant Attorney General

PAUL BENDER
Deputy Solicitor General

CORNELIA T.L. PILLARD
Assistant to the Solicitor General

DAVID K. FLYNN
STEVEN H. ROSENBAUM
SAMUEL R. BAGENSTOS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

51pp

QUESTIONS PRESENTED

1. Whether a district court assessing a covered jurisdiction's purpose under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, may disregard factors this Court has held are relevant to proof of discriminatory purpose, on the ground that such evidence is also relevant to show vote dilution under Section 2, 42 U.S.C. 1973.

2. Whether the district court clearly erred in finding no discriminatory purpose.

3. Whether a voting change that clearly violates Section 2 of the Voting Rights Act is entitled to preclearance under Section 5 of the Act.

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OPINION BELOW

The opinion of the three-judge district court (J.S. App. 1a-65a) is reported at 907 F. Supp. 434 (D.D.C. 1995).

JURISDICTION

The judgment of the three-judge district court was entered on November 2, 1995. A notice of appeal was filed on December 27, 1995. J.S. App. 163a-164a. The Court noted probable jurisdiction on June 3, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1253 and 42 U.S.C. 1973c.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are Sections 2 and 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973, 1973c. J.S. App. 165a-167a. This case also involves a provision

of the Procedures for the Administration of Section 5, 28 C.F.R. 51.55(b)(2). J.S. App. 168a.

STATEMENT

1. Congress enacted the Voting Rights Act of 1965 to eliminate racial discrimination in voting. Section 5 of the Act, 42 U.S.C. 1973c, provides that a covered jurisdiction may not implement any change affecting voting unless it first obtains judicial or administrative preclearance. A covered jurisdiction may obtain judicial preclearance of a voting change by establishing in a declaratory judgment action in the United States District Court for the District of Columbia that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. 1973c. Alternatively, a covered jurisdiction may submit the voting change to the Attorney General for administrative preclearance. The change may be enforced if, within 60 days after its submission to her, the Attorney General has interposed no objection to it. There is no dispute that the Bossier Parish School Board redistricting plan involved in this case is a change in an election practice by a jurisdiction that is covered by the requirements of Section 5. See J.S. App. 140a-141a (¶¶ 249, 251).

Section 2 of the Act, as amended in 1982, 42 U.S.C. 1973, prohibits any voting practice "which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. 1973(a). A voting practice violates Section 2 if it has the discriminatory effect of denying minority citizens an equal opportunity to participate in the electoral process and to elect representatives of their choice. 42 U.S.C. 1973(b).

2. a. This appeal arises from a declaratory judgment action by the Bossier Parish School Board (Board) for preclearance of a redistricting plan. The 12-member

Board governs the Bossier Parish School District, which is coterminous with the parish. J.S. App. 3a-4a. The Board is elected from single-member districts for four-year, concurrent terms. A majority-vote requirement applies to elections of Board members. *Id.* at 4a. The Board redistricted following the 1990 census in order to eliminate population malapportionment among its districts.

In 1990, black persons comprised 20.1% of the total population of Bossier Parish, and 17.6% of the voting age population. J.S. App. 2a. As of 1994, blacks comprised 15.5% of Bossier Parish's registered voters. *Ibid.* The black population of the parish is concentrated in two areas: More than 50% of the black residents live in Bossier City, *id.* at 68a (¶ 10), and the remaining black population is concentrated in four populated areas in the northern rural portion of the parish, *id.* at 2a, 68a (¶ 10).[1] The parties have stipulated that it is feasible to draw two reasonably compact black-majority districts in Bossier Parish using traditional redistricting features such as roads, streams, railroads, and corporate boundaries: one in Bossier City, *id.* at 76a (¶ 36), and one in the northern rural area of the parish, *id.* at 114a (¶ 148); see *id.* at 113a-115a (¶¶ 143-150).

The parties also have stipulated to facts showing that voting in the parish is racially polarized, J.S. App. 40a, 122a-127a (¶¶ 181-196); see also J.A. 113-121 (Engstrom declaration), and that "voting patterns in Bossier Parish are affected by racial preferences," J.S. App. 122a (¶ 181). At the time the Board voted to adopt the redistricting plan at issue in this case, black candidates had

[1] The northern rural portion of the parish is sparsely populated in comparison with the rest of the parish, with more densely populated communities separated by large, lightly settled areas. In the School Board redistricting plan at issue in this case, that portion of the parish is encompassed in a single, 33.5-mile-long, 424-square-mile district. The district encompasses almost half of the area of Bossier Parish. J.S. App. 114a-115a (¶ 149); *id.* at 112a (¶ 140).

run for election to the Board on at least four occasions, but none had ever been elected. *Id.* at 4a, 115a (¶ 153); see also J.A. 54-60. Black voters historically have also been unable to elect candidates of their choice to other political positions in Bossier Parish. J.S. App. 118a-172a (¶¶ 153-196). Of the 14 elections in the parish since 1980 in which a black candidate has run against a white candidate in a single-member district or for mayor, only two black candidates have won. *Id.* at 127a (¶ 196); see also J.A. 54-60. One was a candidate for the Bossier Parish Police Jury,[2] and the other for the Bossier City Council. *Ibid.* The black Police Juror won in Police Jury District 10, which contained a United States Air Force base, J.S. App. 117a (¶¶ 160-161), and the black City Council member won in a city council district that substantially overlapped with Police Jury District 10, and also included the Air Force base, *id.* at 120a (¶ 172). The district court found that the Base is a factor unique to those districts that increased the ability of black voters in that area to elect representatives of their choice. *Id.* at 2a n.1.[3]

Bossier Parish and its School Board have a history of racial discrimination beginning before the Civil War and continuing to the present. See generally J.S. App. 42a-

[2] The Police Jury is the governing body for the parish. See pages 6-7, *infra*.

[3] Many residents in and around the base do not vote in local elections, J.S. App. 117a-118a (¶¶ 160-163); that factor, together with the tendency of Air Force retirees who settle in the area to vote in a less racially polarized way than other Bossier Parish residents, increases the ability of black voters in the districts containing the Air Force base to elect representatives of their choice. *Id.* at 117a-118a (¶¶ 162-163), 127a (¶ 196). In the reconfigured plans adopted by the Police Jury in 1991 and the City Council in 1993, the Air Force base no longer has that effect. *Id.* at 2a n.1. The black incumbent Police Juror was reelected in 1991 in the redrawn district in an election in which he ran unopposed. *Ibid.* The black City Council member ran against a white opponent in 1993 and lost. *Id.* at 120a (¶ 173).

46a, 130a-140a (¶¶ 214-248).[4] De jure segregation prevailed in Louisiana's schools long after this Court decided *Brown* v. *Board of Educ.*, 347 U.S. 483 (1954). J.S. App. 136a (¶ 235). The Board has repeatedly sought to evade its desegregation obligations. *Id.* at 136a-137a (¶¶ 237-239). It remains under court order to remedy the vestiges of racial discrimination in its school system. See *Lemon* v. *Bossier Parish School Bd.*, 240 F. Supp. 709 (W.D. La. 1965), aff'd, 370 F.2d 847 (5th Cir.), cert. denied, 388 U.S. 911 (1967). Notwithstanding the Board's affirmative obligation to desegregate, the schools in Bossier Parish have, since 1980, become increasingly segregated by race. J.S. App. 137a-138a (¶¶ 240-242). Although black students comprise only 29% of the Parish's student population, four of the 27 schools in the Parish have student bodies that are more than 70% black. *Id.* at 138a (¶ 242).[5]

In addition to presiding over increasing racial segregation in parish school populations, the Board has violated the *Lemon* court's order by failing to maintain a biracial

[4] Many decades of discriminatory government action in Louisiana resulted in the large-scale disenfranchisement of black voters. Following the passage of the Thirteenth Amendment, Louisiana enacted laws intended to reduce black voting; black registration decreased by 90% within a few years. J.S. App. 130a-131a (¶¶ 215-219). In 1921, an amendment to the state Constitution required persons seeking to register to vote to "give a reasonable interpretation" of a constitutional provision. *Id.* at 132a (¶ 221). That clause, which disenfranchised most black citizens, was not invalidated until 1965. *Louisiana* v. *United States*, 380 U.S. 145 (1965). After an all-white Louisiana Democratic primary was invalidated, the party adopted other discriminatory election devices, including an anti-single-shot law and a majority-vote requirement for party office. J.S. App. 132a (¶ 222); *Major* v. *Treen*, 574 F. Supp. 325, 341 (E.D. La. 1983).

[5] Each of those four predominantly black schools is located within one of the two areas, Bossier City and the northern rural portion of the parish, J.S. App. 12a (¶ 142), in which a reasonably compact majority-black district may be drawn, *id.* at 76a (¶ 36); *id.* at 114a-115a (¶¶ 148-150).

committee to recommend ways to attain and maintain a unitary school system. J.S. App. 103a-104a (¶¶ 111-112). The Board first convened the committee in 1976, but only the black committee members attended the few meetings that were held, and the Board promptly disbanded the committee. *Ibid.* The Board did not convene another biracial committee until 1993, shortly after submitting its redistricting plan to the Justice Department for Section 5 review. *Id.* at 104a (¶ 113). The Board promptly disbanded that committee because, as School Board President Barry Musgrove explained, "the minority members of the committee quickly turned toward becoming involved in policy." *Id.* at 105a (¶ 116).

The effects of past discrimination in Bossier Parish continue today: "Black citizens of Bossier Parish suffer a markedly lower socioeconomic status than their white counterparts" that is "traceable to a legacy of racial discrimination affecting Bossier Parish's black citizens." J.S. App. 128a (¶ 200); see generally *id.* at 127a-130a (¶¶ 197-213). That status "makes it harder for blacks to obtain necessary electoral information, organize, raise funds, campaign, register, and turn out to vote, and this in turn causes a depressed level of political participation for black persons within Bossier Parish." *Id.* at 130a (¶ 213). Significantly smaller proportions of black voting-age citizens than white voting-age citizens have in fact registered to vote in Bossier Parish. *Id.* at 127a (¶ 197).

b. Following the 1990 census, redistricting efforts by the Bossier Parish Police Jury preceded the School Board redistricting. The Police Jury, like the School Board, consists of 12 members who are elected from single-member districts in the same manner as the Board. J.S. App. 2a. The Police Jury has never had a districting plan that contained any majority-black districts. *Ibid.*

During the 1990-1991 redistricting process, the white Police Jurors and their demographer knew that it was feasible to effectuate black political participation by adopting a non-dilutive redistricting plan. J.S. App. 76a (¶ 36), 82a-83a (¶ 53), 114 (¶ 148). Police Jurors nonetheless told citizens who advocated creating majority-black districts that it was impossible to create such districts because the black population was too dispersed. *Id.* at 3a, 83a (¶ 54); see also *id.* at 82a (¶ 52). In April, 1991, the Police Jury adopted a redistricting plan that, like all of its predecessors, contains no majority-black districts. *Id.* at 3a, 68a (¶ 11).

On May 28, 1991, the Police Jury submitted its redistricting plan to the Attorney General seeking preclearance under Section 5. The Police Jury did not provide the Attorney General with information then available to it showing that reasonably compact majority-black districts could be created. J.S. App. 68a-69a (¶ 11), 76a (¶ 36), 82a-83a (¶ 53). Nor did it provide a copy of a letter from the Concerned Citizens of Bossier Parish, a local organization, protesting the Police Jury's exclusion of black citizens from the redistricting process, *id.* at 69a (¶ 11), despite the organization's express request that the letter be included in the Police Jury's Section 5 submission, *id.* at 87a (¶¶ 65, 66). On July 29, based on what turned out to be inaccurate and incomplete information, the Attorney General precleared the Police Jury redistricting plan. *Id.* at 3a, 68a-69a (¶ 11).

c. The School Board began its own redistricting process in early 1991. J.S. App. 4a. With its next election not scheduled to occur until October, 1994, the Board proceeded without urgency. *Id.* at 4a, 93a (¶ 83). The Board initially chose not to use the districts in the 1991 Police Jury plan, but to develop a different plan. *Id.* at 4a, 28a, 47a, 94a (¶ 87). Although the Board and the Police Jury have jurisdiction over the same geographic area and both use 12 single-member districts, the bodies serve different functions and for at least a decade have maintained different electoral districts. *Id.* at 3a-4a & n.3, 72a-73a (¶¶ 24, 26); U.S. Exh. 94, at 14. School boards and police juries have different redistricting inter-

ests that generally warrant different plans: "For example, police juries are concerned with road maintenance, drainage, and in some cases garbage collection, and the level of demand for such services in each district is a concern. School board members, by contrast, are typically concerned with having a public school or schools in each district." J.S. App. 73a (¶ 24); U.S. Exh. 94, at 14-15. Police Jury district lines do not correspond with school attendance zones, and schools are unevenly distributed in the Police Jury districts, with some districts containing no schools and others containing several. J.S. App. 8a, 112a (¶ 141). If used by the Board, the 1991 Police Jury plan would, in addition, pit two sets of Board incumbents against one another and create other districts with no Board incumbents. *Id.* at 8a, 102a (¶ 109).

The Board hired Gary Joiner, the Police Jury's cartographer, to develop a redistricting plan for the Board, estimating that he would spend 200 to 250 hours on the project. J.S. App. 92a (¶ 80), 94a (¶ 86). The cartographer met privately with Board members and showed them various computer-generated alternative districts. *Id.* at 97a (¶ 96).

Beginning in March, 1992, representatives of local black community groups (including defendant-intervenor George Price, president of the local chapter of the NAACP) requested that representatives of the black community be included in the Board's redistricting process. The Board did not respond to those requests. J.S. App. 5a, 96a-98a (¶¶ 93-94, 97). In August, 1992, with no other plan publicly on the table, Price presented a plan for two majority-black districts that had been developed by the NAACP. *Id.* at 6a, 96a-97a (¶ 95), 98a (¶¶ 98-99). Price was told that the Board would not consider a plan that did not also draw the other ten districts. *Id.* at 6a, 98a (¶ 99).

At the September 3, 1992, Board meeting, Price presented an NAACP plan depicting all 12 districts, but the Board refused to consider it, ostensibly because "the

plan's district lines crossed existing precinct lines, and therefore violated state law." J.S. App. 99a (¶ 102); *id.* at 6a.[6] The Board's cartographer and attorney knew at the time, however, that the crossing of existing precinct lines did not legally preclude the Board from considering the plan. *Id.* at 99a-100a (¶ 102). Although state law prohibits school boards from splitting precincts, *id.* at 71a-72a (¶ 21), school boards were always "free to request precinct changes from the Police Jury necessary to accomplish their redistricting plans [*sic*: goals]," *id.* at 7a (quoting *id.* at 72a (¶ 23)). That practice is "quite common" statewide. *Id.* at 72a (¶ 22); J.A. 168 (Joiner testimony); see J.A. 136-138 (Creed testimony); J.A. 140-141 (Creed supplemental testimony).[7] The Bossier Parish School Board itself apparently had anticipated the necessity of splitting precincts in its redistricting plan. See J.S. App. 29a, 56a-57a, 95a (¶ 89). Joiner had given the Board precinct maps at the start of the redistricting process, telling them that they "would have to work with the Police Jury to alter the precinct lines," *id.* at 95a (¶ 89).

At no time during the redistricting process did the Board or its cartographer ever assert that there was any value in avoiding precinct splits or in minimizing their number. Nor, during the redistricting process, did Board members or their cartographer ever discuss the alleged costs of creating precinct splits. See generally U.S. Exhs. 26-28, 32, 34 (Board minutes); J.A. 87-88 (Blunt testimony). The Board never requested that the Police Jury consider realigning the precincts. J.S. App. 7a. The

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[6] Louisiana election precincts are administrative units established for the purpose of conducting elections, including siting polling booths and allocating election officials. See Defendant-Intervenors' Exh. G at 15.

[7] For example, of the nine redistricting plans the Board's cartographer had drawn for Louisiana parishes, five involved school boards that sought and received precinct changes from their police juries in this manner. Tr. vol. I (Apr. 10, 1995), at 157-158 (Joiner testimony).

Board also never asked its cartographer to explore the possibility of modifying the NAACP proposal to reduce the number of precinct splits, or of otherwise developing a plan that would alleviate black vote dilution. *Id.* at 101a (¶ 106).

Instead, at the Board's next scheduled meeting, two weeks after Price presented the NAACP plan and two years before the next Board election, the Board unanimously passed a motion of intent to adopt the Police Jury plan that it had initially found unsatisfactory. J.S. App. 100a (¶ 106). The Board's action to adopt the Police Jury plan precipitated overflow citizen attendance at a Board meeting on September 24, 1992. *Id.* at 7a-8a, 101a (¶ 108). Fifteen residents voiced their opposition to adoption of the Police Jury plan, principally on the ground that it would dilute black voting strength. *Ibid.* No one spoke in favor of the Police Jury plan. *Id.* at 8a. The NAACP presented a petition containing over 500 signatures—the largest number of signatures on a petition opposing a Board action that had been submitted on any subject in years. *Id.* at 101a (¶ 108). The petition asked the Board to consider alternatives to the Police Jury plan that would be less dilutive of minority voting strength. *Id.* at 7a-8a.

George Price, on behalf of several community organizations representing interests of black residents, urged the Board to consider the NAACP plan or to use it as a foundation for creating a different non-dilutive plan. J.S. App. 6a-8a; 101a (¶ 108). Price also explained to the Board that, in light of the NAACP plan, which demonstrated the feasibility of drawing one or more reasonably compact majority-black districts, the Attorney General's preclearance of the Police Jury plan did not guarantee preclearance of the same plan for School Board elections. J.A. 122, 132. The Board did not respond to the opponents of the Police Jury plan, and adopted that plan at its next meeting. J.S. App. 8a, 102a (¶ 109).

Several board members explained, in private conversations, why the Board had refused to consider any less dilutive redistricting plan. Board member Henry Burns stated that although he personally favors "having black representation on the board, other school board members oppose that idea." J.A. 93 (Davis testimony); J.S. App. 31a, 53a-54a. Board member Barry Musgrove said that "the Board was 'hostile' toward the idea of a black majority district." J.A. 123 (Price testimony); J.S. App. 53a. Board member Thomas Myrick explained to Price his own opposition to a less dilutive redistricting plan. Myrick represented a district that included portions of predominantly black communities, which, if not divided, could comprise part of a black-majority district north of Bossier City. J.S. App. 81a (¶ 48), 93a-94a (¶ 85); see also J.A. 102-103 (Castille declaration); J.S. App. 110a-111a (¶¶ 133-138).[8] Myrick told Price that "he had worked too hard to get [his] seat and that he would not stand by and 'let [them] take his seat away from him.'" J.A. 124 (Price testimony); see J.A. 135 (Harry testimony); J.S. App. 53a. Myrick also told Joiner, the Board's own cartographer, that he wanted to avoid creating a black-majority district. J.A. 163-164 (Joiner testimony).

The Board submitted the Police Jury plan to the Attorney General for preclearance. On August 30, 1993, the Attorney General objected to the plan under Section 5 of the Voting Rights Act, citing information available to

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[8] Myrick, accompanied by at least two Police Jurors who represented districts that similarly divided black communities, had met frequently with the Police Jury's cartographer, Gary Joiner, during the Police Jury redistricting process. J.S. App. 81a (¶ 48), 93a-94a (¶ 85). Although Myrick flatly denied at trial having met with Joiner, J.A. 151, 156-157, Joiner testified that Myrick had come to his office several times—as many as six to ten—to discuss the Police Jury redistricting, and to indicate his opposition to drawing a black majority district, J.A. 159-164. It was Myrick who first proposed to the Board that it adopt the Police Jury plan as its own. J.A. 151-152 (Myrick testimony).

the Board, showing the clear discriminatory effect of the plan on minority voting strength, that had not been provided when the Police Jury submitted the same plan in 1991. J.S. App. 8a, 106a (¶ 119), 154a-158a. On December 20, 1993, the Attorney General denied the Board's request for reconsideration and withdrawal of the objection. *Id.* at 159a-162a.

3. On July 8, 1994, the Board filed a declaratory judgment action seeking Section 5 preclearance from a three-judge district court for the District of Columbia. One judge of the panel presided over a two-day trial that was held on April 10 and 11, 1995. The record, consisting primarily of stipulated facts, written direct testimony prepared before trial, and the transcript of live cross and redirect examinations, was provided to the other judges and closing argument was conducted before the entire panel. J.S. App. 9a. On November 2, 1995, the district court granted preclearance. *Id.* at 36a.

The district court first held that Section 5 preclearance cannot be denied based upon a violation of Section 2. J.S. App. 11a-12a. The court reasoned that Section 2 "uses plainly different language and serves a different function from that of section 5." *Id.* at 15a. The court held that the discriminatory effects addressed by Section 5 are limited to retrogressive effects, whereas Section 2's "results" standard "can be violated * * * irrespective of whether the disputed voting practice is better or worse than whatever it is meant to replace." *Ibid.* The court did not address the United States' alternative argument that a Section 2 violation, even if not a form of prohibited "effect" under Section 5, nevertheless constitutes an equitable defense against Section 5 preclearance, on which the United States bears the burden of proof. See U.S. Post-Trial Br. 32 n.27.

The district court concluded that the legislative history of the Act did not support denial of preclearance based on a Section 2 violation. In its view, resort to the legislative history was inappropriate because the language of the statute is "unambiguous." J.S. App. 17a. The court also refused to accord any deference to the Department of Justice regulation requiring the Attorney General to withhold preclearance of voting changes that clearly violate Section 2, 28 C.F.R. 51.55(b)(2), on the ground that a federal court has authority co-equal with that of the Attorney General to interpret Section 5 in the first instance. J.S. App. 18a-19a. In light of its legal ruling, the court declined to decide whether the evidence established that the redistricting plan was dilutive in violation of Section 2. *Id.* at 9a n.6.

The district court then held that the Board had met its burden of showing that, in adopting the Police Jury plan, it did not act with a racially discriminatory purpose. J.S. App. 27a-29a. In deciding that question, the court held that "evidence of a section 2 violation" may not be considered as "evidence of discriminatory purpose under section 5." *Id.* at 23a; see also *id.* at 24a, 9a n.6. The court thus refused to consider, as relevant to the Board's purpose, evidence of the Board's contemporaneous awareness that the Police Jury plan was dilutive and therefore had the discriminatory effect of precluding any meaningful opportunity for black citizens to elect representatives of their choice. *Id.* at 9a n.6. The district court also refused to consider evidence that the Board had a long history of racial discrimination, including continuing noncompliance with a court order in the three-decade-old *Lemon* school desegregation case in which it is a defendant. *Id.* at 34a n.18.

The district court acknowledged that the Board had "offered several reasons for its adoption of the Police Jury plan that clearly were not real reasons." J.S. App. 27a & n.15. It nonetheless found "legitimate, nondiscriminatory motives" for the Board's adoption of the Police Jury plan: "The Police Jury plan offered the twin attractions of guaranteed preclearance and easy implementation (be-

cause no precinct lines would need redrawing)." *Id.* at 27a-28a.

Judge Kessler concurred in part and dissented in part. J.S. App. 37a-65a. She agreed with the majority that a Section 2 violation does not prevent Section 5 preclearance, J.S. App. 37a, but dissented from the majority's conclusion that the Board acted with legitimate, nondiscriminatory motives, *id.* at 38a-65a. Taking into account evidence that this Court held in *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 (1977), is relevant in assessing discriminatory purpose, Judge Kessler would have found that "the evidence demonstrates conclusively that the Bossier School Board acted with discriminatory purpose." J.S. App. 39a.

SUMMARY OF ARGUMENT

1. This Court consistently has held that the discriminatory effect of a voting change on racial minorities, and the history of discrimination by the jurisdiction that adopted the change, are highly relevant in the assessment of whether the jurisdiction acted with a discriminatory purpose. By prohibiting consideration of such probative evidence under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, the district court squarely contravened this Court's established approach to determining discriminatory purpose in both voting and non-voting contexts. Because the application of an erroneously restrictive legal standard necessarily affected its decision, the district court's judgment cannot stand.

When all the relevant evidence is considered, the record permits only one conclusion: that the Board adopted its redistricting plan with a racially discriminatory purpose. In addition to the clearly dilutive impact of the plan—which "effectively excludes minority voters from the political process," J.S. App. 41a—and the Board's history of discrimination, several other indicia make the Board's discriminatory purpose clear. After a long, deliberate search

for a redistricting plan different from that of the Police Jury, the Board suddenly rushed to adopt the Police Jury plan as soon as it became clear that the local African-American community would oppose any efforts to obtain preclearance of a dilutive plan. As a result, the School Board entirely disserved two of its primary traditional districting concerns: incumbency protection and distribution of schools and attendance areas among districts. The decision to adopt the Police Jury plan at the time it was adopted makes sense only if the Board was intent on drawing a plan without *any* majority-black districts and chose the Police Jury plan because it was the only such plan that the Board thought likely to be precleared.

In this context, "guaranteed preclearance" was not, as the district court believed (J.S. App. 28a), a nondiscriminatory motivation; rather, it was a means of effectuating the Board's purposeful discrimination. Although the Board has asserted other allegedly legitimate justifications, those reasons constituted nothing more than post hoc rationalizations. Indeed, the district court found that many of the Board's asserted motivations "clearly were not real reasons" for its actions. *Id.* at 27a n.15. The district court's finding of no discriminatory purpose is clearly erroneous and must therefore be reversed.

2. The district court also erred in holding that voting changes that dilute minority voting strength in violation of Section 2 of the Act are entitled to preclearance under Section 5. Since *Beer* v. *United States*, 425 U.S. 130 (1976), this Court has recognized that an unlawfully dilutive voting change is not entitled to preclearance. When it amended Section 2 and extended Section 5 in 1982, Congress was aware of and endorsed that rule; it therefore expressed its intent that preclearance should be withheld from changes that violate amended Section 2's prohibition on vote dilution. The same principle is embodied in a regulation promulgated by the Attorney General in 1987 and drafted with close legislative oversight. 28 C.F.R.

51.55(b)(2). The district court's ruling that changes which are known to be illegal under Section 2 must nevertheless be precleared creates an anomaly that is plainly contrary to Congress's intent.

ARGUMENT

I. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE BOSSIER PARISH SCHOOL BOARD ADOPTED THE POLICE JURY REDISTRICTING PLAN WITHOUT ANY DISCRIMINATORY PURPOSE

A. The District Court Committed Legal Error by Categorically Refusing to Consider the Dilutive Effect of the Board's Decision and the Board's History of Discrimination

1. Under Section 5, a voting change adopted with a discriminatory purpose may not be precleared. See 42 U.S.C. 1973c; *City of Richmond* v. *United States*, 422 U.S. 358, 378-379 (1975). "[D]etermining the existence of a discriminatory purpose 'demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.' " *Rogers* v. *Lodge*, 458 U.S. 613, 618 (1982) (quoting *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 (1977)). In *Arlington Heights*, this Court set forth a nonexhaustive list of factors relevant to that inquiry. "The impact of the official action—whether it 'bears more heavily on one race than another'—may provide an important starting point." *Arlington Heights*, 429 U.S. at 266 (citation omitted) (quoting *Washington* v. *Davis*, 426 U.S. 229, 242 (1976)). Other relevant factors include the "historical background of the decision"—"particularly if it reveals a series of official actions taken for invidious purposes," 429 U.S. at 267; the "specific sequence of events leading up to the challenged decision," including any procedural or substantive departures from normal practices, *ibid.*; and the "legislative or administrative history"—"especially

where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports," *id.* at 268.

This Court has applied the *Arlington Heights* standards in adjudicating claims of unconstitutional, purposeful vote dilution. See *Rogers*, 458 U.S. at 618-622; *City of Mobile* v. *Bolden*, 446 U.S. 55, 70 (1980) (plurality opinion). The Court has also repeatedly affirmed judgments of three-judge district courts that have applied those standards to Section 5's discriminatory purpose analysis. See *City of Pleasant Grove* v. *United States*, 568 F. Supp. 1455, 1458 (D.D.C. 1985), aff'd, 479 U.S. 462 (1987); *Busbee* v. *Smith*, 549 F. Supp. 494, 516-517 (D.D.C. 1982), aff'd, 459 U.S. 1166 (1983); *City of Port Arthur* v. *United States*, 517 F. Supp. 987, 1019 (D.D.C. 1981), aff'd, 459 U.S. 159 (1982).

The district court did not follow the established *Arlington Heights* approach. Instead, it incorrectly limited the facts it considered probative of discriminatory purpose in a Section 5 proceeding. The court specifically refused to consider either the discriminatory effect of the challenged redistricting plan on minority voters or Bossier Parish's history of racial discrimination. Characterizing that evidence as "section 2 evidence," the district court asserted that it had no bearing on the assessment of purpose in a Section 5 proceeding.[9] The court thus ignored important facts that were highly probative of the Board's purpose in

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[9] J.S. App. 23a ("*Miller*[v. *Johnson*, 115 S. Ct. 2475 (1995)] forecloses the permitting of section 2 evidence in a section 5 case."); *id.* at 24a ("[W]e will not permit section 2 evidence to prove discriminatory purpose under section 5."); *id.* at 34a n.18 (suggesting that the historical failure of the School Board to comply with the terms of the desegregation order entered against it was irrelevant to the inquiry into its purpose in adopting a redistricting plan with no majority-black districts); see also *id.* at 9a n.6 ("Because we hold * * * that section 2 of the Voting Rights Act * * * has no place in this section 5 action, much of the evidence relevant only to the section 2 inquiry is not discussed in this opinion.").

adopting the redistricting plan for which it sought preclearance.

a. The district court erred in refusing to consider evidence of the dilutive effect of the Board's redistricting plan on minority voting strength. "Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the [challenged decision] bears more heavily on one race than another." *Washington* v. *Davis*, 426 U.S. at 242. In the voting rights context, evidence of the discriminatory impact of a decision is often "an important starting point" for an inquiry into purpose. *Bolden*, 446 U.S. at 70; see *Rogers*, 458 U.S. at 623-624. So, too, in discrimination cases arising in other contexts, this Court has held that the impact of a challenged practice is an important element in the assessment of purpose. See, *e.g.*, *Pullman-Standard* v. *Swint*, 456 U.S. 273, 289 & n.18 (1982) (Title VII); *Columbus Bd. of Educ.* v. *Penick*, 443 U.S. 449, 464 (1979) (education); *Personnel Administrator* v. *Feeney*, 442 U.S. 256, 274-275 (1979) (employment); *Arlington Heights*, 429 U.S. at 266 (zoning). "Impact" evidence is probative because, when the adverse consequences of a challenged action upon an identifiable group are inevitable or foreseeable, "a strong inference that the adverse effects were desired can reasonably be drawn." *Feeney*, 442 U.S. at 279 n.25.

The School Board was well aware of the dilutive effect of the Police Jury plan upon minority voting strength, and the Board's adoption of that plan with knowledge of that effect is strongly probative of the Board's discriminatory purpose. As Judge Kessler noted below, the Police Jury plan "effectively excludes minority voters from the political process." J.S. App. 41a. Ample evidence established that the Board was aware of that dilutive impact. "There was * * * overwhelming evidence of bloc voting along racial lines" and, "although there had been black candidates, no black had ever been elected" to the Bossier

Parish School Board. *Rogers*, 458 U.S. at 623; J.S. App. 40a, 115a-127a (¶¶ 153-196).[10] The Board admitted that it was "obvious that a reasonably compact black-majority district could be drawn within Bossier City," *id.* at 76a (¶ 36), and that the NAACP plan Price presented to the Board demonstrated that a second, reasonably compact majority-black district could be drawn using natural and artificial boundaries traditionally used in redistricting. *Id.* at 113a-115a (¶¶ 143-150). Price and many other citizens told the Board that the proposed redistricting plan would unnecessarily diminish black voting strength. *Id.* at 101a-102a (¶ 108).

"[R]ather than consider either of the alternative proposals [that included compact majority-black districts] brought before it or direct their own cartographer to draft one," however, "the School Board adopted a plan 'which guaranteed that blacks would remain underrepresented on the [Board] by comparison to their numerical strength.'" J.S. App. 41a (quoting *City of Port Arthur*, 517 F. Supp. at 1022). Such "actions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose." *Penick*, 443 U.S. at 464. The district court erred in refusing to consider, as relevant to the Board's purpose, this substantial, largely stipulated evidence demonstrating minority vote dilution. See *Rogers*, 458 U.S. at 623-627.

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[10] Board members knew that no black candidate had ever been elected to the Board, J.A. 125, 126 (letters from Price to School Board); U.S. Exh. 98, at 28-30 (Board member Hensley testimony regarding Board receipt of Price letter), and the presence of racial bloc voting in Bossier Parish was generally recognized among the community and elected officials, see, *e.g.*, U.S. Exh. 102, at 8-9 (Board member Blunt testimony); J.S. App. 122a (¶ 181) (Police Juror Burford's understanding that there was substantial racial bloc voting); U.S. Exh. 31 (recognition in local press); U.S. Exh. 104, at 4, 8 (former Bossier City Councilman Jeff Darby testimony); U.S. Exh. 105, at 11-13 (police juror Jerome Darby testimony).

b. The district court also failed to take into account other relevant evidence of purpose solely because it would also be relevant in a Section 2 proceeding. This Court has held that "[e]vidence of historical discrimination is relevant to drawing an inference of purposeful discrimination." *Rogers*, 458 U.S. at 625; accord *Arlington Heights*, 429 U.S. at 267. The district court, however, refused to consider the Board's substantial and continuing legacy of discrimination against blacks in its administration of the Bossier Parish school system. J.S. App. 9a n.6, 34a n.18, 42a n.4; compare *id.* at 34a n.18 with *id.* at 42a-46a, 136a-138a (¶¶ 236-243).

The Bossier Parish School Board has presided over increasingly segregated schools in spite of its affirmative, continuing duty to eliminate racial segregation; that fact buttresses our contention that the same Board acted with a discriminatory purpose when it adopted a redistricting plan that adversely dilutes black voting strength. *Rogers*, 458 U.S. at 624-625 (referring to lingering school segregation as relevant to proof of purposeful discrimination). Indeed, the Board recently violated a court desegregation order by disbanding a biracial committee; it did so because "the tone of the committee made up of the minority members * * * quickly turned toward becoming involved in policy." J.S. App. 105a (¶ 116).[11] That action is probative of the Board's unresponsiveness to reasonable concerns of the black community—another "important element * * * of [the] number of circumstances a court should consider in determining whether discriminatory purpose may be inferred." *Rogers*, 458 U.S. at 625 & n.9. The district court erred as a matter of law by refusing to take into account that highly probative evidence of the Board's continuing racial discrimination.

[11] As Judge Kessler noted, "[w]hat exactly the Committee was supposed to become involved in, if not policy, is unclear." J.S. App. 46a.

2. The district court gave three reasons for categorically excluding from consideration any evidence that would be relevant in a Section 2 case. None is persuasive.

First, the court suggested that allowing such evidence in the discriminatory purpose inquiry would impermissibly allow a denial of preclearance to be based solely on a Section 2 violation. J.S. App. 23a.[12] We contend, not that evidence of a Section 2 violation necessarily *suffices* to prove discriminatory purpose; see *Rogers*, 458 U.S. at 618; *Bolden*, 446 U.S. at 70, but that it is *relevant* to the purpose inquiry, see *Rogers*, 458 U.S. at 623-624; *Arlington Heights*, 429 U.S. at 265; see also *Arizona* v. *Reno*, 887 F. Supp. 318, 323-324 (D.D.C. 1995) (evidence relevant to Section 2 violation also relevant to Section 5 purpose inquiry), appeal dismissed, 116 S. Ct. 1037 (1996).[13] The district court erred as a matter of law in ignoring that probative evidence.

Second, the district court suggested that this Court's decision in *Miller* v. *Johnson*, 115 S. Ct. 2475 (1995), foreclosed any argument that the Board's adoption of a plan that it knew diluted minority voting strength evidenced its discriminatory purpose. J.S. App. 34a-36a. That is incorrect. In *Miller*, 115 S. Ct. at 2492-2493, the Court considered an ameliorative redistricting plan and

[12] As we explain below, a violation of Section 2 provides an independent basis for denying preclearance. See Point II, *infra*.

[13] The district court erred in relying on *New York* v. *United States*, 874 F. Supp. 394, 398-400 (D.D.C. 1994), in support of its holding that evidence of a discriminatory effect that violates Section 2 "has no place" in a Section 5 case. J.S. App. 9a n.6, 22a-23a. The three-judge court in *New York* merely held that discriminatory purpose may not "*always* be inferred" from adoption of a system that has a discriminatory effect or, in the case of a redistricting plan, a dilutive impact, 874 F. Supp. at 399 (emphasis added); it did not hold, as did the district court below, that evidence of a discriminatory effect is *irrelevant* to the Section 5 purpose inquiry. See *ibid.* (citing *Arlington Heights*, 429 U.S. at 266).

held that purposeful refusal to subordinate traditional districting principles in order to "maximiz[e]" the number of majority-black districts fails to demonstrate purposeful discrimination. See also *Shaw* v. *Hunt*, No. 94-923 (June 13, 1996), slip op. 11-14 (*Shaw II*). Here, by contrast, the Board sought consciously to *minimize* the number of majority-black districts. Despite concentrations of black population, the Board adopted a plan that lacks any majority-black district, and that has had the clearly foreseeable effect of diluting minority voting strength, and the Board did so in circumstances strongly suggesting a discriminatory motivation. Such "conscious *minimizing* of black voting strength" is clearly relevant to a finding of discriminatory purpose. *Busbee*, 549 F. Supp. at 517 (emphasis added); see *id.* at 518.[14] Neither *Miller* nor *Shaw II* disturbed the well-settled rule that *Arlington Heights* provides the appropriate standard for determining discriminatory purpose under Section 5. Rather, the Court disagreed in those cases with the Attorney General's application of that standard to the particular plans submitted for preclearance. The Court's holdings cast no doubt on the continued application of traditional discriminatory purpose analysis in Section 5 cases.

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[14] The Court in *Miller* did not refuse to consider evidence of the effect of the challenged districting plan. In evaluating whether the plan there was adopted with a discriminatory purpose, the Court considered the plan's ameliorative impact. 115 S. Ct. at 2492. *Miller* is therefore fully consistent with the substantial precedent mandating consideration of the effect of a decision as one element in the totality of circumstances that indicates whether the decision was purposefully discriminatory. Indeed, throughout its *Miller* opinion, the Court cited *Arlington Heights* with approval. *Miller*, 115 S. Ct. at 2483, 2487, 2489. And while this Court recently expressed doubt that "a showing of discriminatory effect under § 2, *alone*, could support a claim of discriminatory purpose under § 5," it did not question the well-established proposition that disparate effects are *relevant* to discriminatory purpose. *Shaw* v. *Hunt*, slip op. at 14 n.6 (emphasis added).

Finally, the district court suggested that a purpose to cause retrogression in the electoral position of minority voters is the *only* type of discriminatory purpose cognizable under Section 5. J.S. App. 23a-24a (quoting *Texas* v. *United States*, Civ. Act. No. 94-1529 (D.D.C. July 10, 1995), slip op. 2-3. Under that approach, a jurisdiction that had never had a majority-minority district could never be found to have a discriminatory purpose in refusing to create such a district. This Court has expressly rejected that proposition. In *City of Richmond*, the Court concluded that the voting change under review there did not have an unlawfully retrogressive effect under Section 5, but it then remanded to the three-judge court for a determination whether the change had been adopted with a discriminatory purpose. Explicitly addressing the question "how it could be forbidden by § 5 to have the purpose and intent of achieving only what is a perfectly legal result under that section," the Court found it "plain" that a voting change made "for the purpose of discriminating against Negroes * * * has no legitimacy at all under our Constitution or under the statute" and "is forbidden by § 5, *whatever its actual effect may have been*." *City of Richmond*, 422 U.S. at 378-379 (emphasis added). The Court reaffirmed that proposition in *City of Pleasant Grove* v. *United States*, 479 U.S. 462 (1987), explaining that a covered jurisdiction may not "short-circuit a purpose inquiry under § 5 by arguing that the intended result was not impermissible," because not retrogressive, "under an objective effects inquiry." *Id.* at 471 n.11. See also *City of Port Arthur* v. *United States*, 459 U.S. 159, 168 (1982) (noting that an electoral scheme adopted for a racially discriminatory purpose would be invalid even if it fairly reflected the political strength of a minority community).

Because of its failure to apply the correct legal standard to the Section 5 purpose inquiry, the district court's decision must be reversed. In this case, as in *Pullman-*

Standard v. *Swint*, the district court "failed to consider relevant evidence" and certainly "might have come to a different conclusion had it considered that evidence." 456 U.S. at 292. At a minimum, the district court's errors require a remand to permit that court to reevaluate the question of purpose in light of all of the relevant evidence.

B. Other Record Evidence, Together With the Evidence the District Court Erroneously Failed to Consider, Demonstrates That the Board Acted With a Discriminatory Purpose in Adopting the Police Jury Plan

The district court not only failed to consider relevant evidence, but also evaluated improperly the limited evidence it did consider. When all the relevant evidence is correctly considered, it supports only one conclusion: the Board acted with a racially discriminatory purpose in adopting the Police Jury plan.

1. Both the "specific sequence of events leading up" to the Board's decision to adopt the Police Jury plan and the substantive consequences of that decision demonstrate that the Board acted with a discriminatory purpose. See *Arlington Heights*, 429 U.S. at 267. The Board initially proceeded without urgency in its redistricting efforts, acting separately from the Police Jury. J.S. App. 4a, 92a (¶ 80). The Board did not even begin its redistricting process until after the Police Jury had completed its own process. At that point the Board hired the Police Jury's redistricting consultant, Gary Joiner, who estimated that it would take 200 to 250 hours to produce a plan for the School Board—far more time than would be necessary simply to adopt the Police Jury plan. *Id.* at 5a, 29a. Those initial decisions were consistent with the Board's needs, for the next Board election would not occur until more than three years after the Police Jury adopted its redistricting plan. *Id.* at 4a. The Board proceeded without haste from May, 1991, until the autumn of 1992.

It also best served the Board's interests to develop a redistricting plan separate from the Police Jury's. Although the two bodies both cover the same geographic area, and both consist of 12 members elected from single-member districts, the Board and the Police Jury had maintained different districts throughout the 1980s. They had done so because "[s]chool boards and police juries have different needs and different reasons for redistricting" in general. J.S. App. 72a (¶ 24). Moreover, the School Board and the Police Jury had divergent incumbency protection concerns (*id.* at 73a (¶ 26), 92a (¶ 81)), and the fact that the Board and the Police Jury had maintained separate districting plans in the previous decade resulted in a continuing divergence in incumbency interests during the post-1990 round of redistricting. *Id.* at 93a (¶ 84).

But the Board sharply changed course in September, 1992, after the local NAACP made clear that it would actively urge the adoption of a districting plan that did not dilute black voting strength. During the summer of 1992, the NAACP repeatedly requested that it be included in the redistricting process. J.S. App. 96a-101a (¶¶ 93, 94, 95, 97, 100, 106, 108); J.A. 125-129. However, when Joiner, the Board's cartographer, demonstrated alternative redistricting scenarios to the Board members, in the late summer of 1992, the NAACP was not informed. J.S. App. 97a (¶¶ 96, 97). At the September 3, 1992, meeting of the Board, NAACP President George Price presented the NAACP's 12-district plan, containing two districts with black voting-age majorities. *Id.* at 98a-99a (¶¶ 98-100). Two weeks later, without directing Joiner to conduct any further study of Price's plan, the Board unanimously passed a motion of intent to adopt the Police Jury plan, which contained no majority-black districts. *Id.* at 100a-101a (¶ 106). Despite unanimously negative public comment at an intervening hearing, the Board adopted the Police Jury plan on October 1 without

a single dissenting vote. *Id.* at 8a, 101a-102a (¶¶ 108-109).

As Judge Kessler concluded, "[t]he common-sense understanding of these events leads to one conclusion: The Board adopted the Police Jury plan—two years before the next election—in direct response to the presentation of a plan that created majority-black districts. Faced with growing frustration of the black community at being excluded from the electoral process, the only way for the School Board to ensure that no majority-black districts would be created was to quickly adopt the Police Jury plan and put the issue to rest." J.S. App. 49a-50a. That conclusion is bolstered by the Board's exclusion of minorities from any meaningful part in the redistricting process, see *Busbee*, 549 F. Supp. at 518, as well as the anomalous substantive consequences of importing the Police Jury's redistricting plan for use in School Board elections. Although the Board had long considered incumbency protection to be an important redistricting interest, the plan the Board adopted pitted incumbents against each other in two districts. J.S. App. 102a (¶ 109).[15] And while school board members "are typically concerned with having a public school or schools in each [School

[15] One incumbent Board member who did not stand to lose from the adoption of the Police Jury plan was Tom Myrick. J.S. App. 95a (¶ 91). See page 11 & n.8, *supra*. The district court found it "understandable" that Myrick held a "strong desire not to have his district so changed that his constituency [was] obliterated" (J.S. App. 32a), but it is clear that Myrick recognized that preserving his existing constituency came at the necessary expense of dividing black voters in northern Bossier Parish among several districts. For Myrick, protecting his incumbency was thus inextricably intertwined with intentionally diluting black voting strength. See *Garza* v. *County of Los Angeles*, 918 F.2d 763, 771 (9th Cir. 1990), cert. denied, 498 U.S. 1028 (1991); *id.* at 778-779 & n.1 (Kozinski, J., concurring in part and dissenting in part); *Ketchum* v. *Byrne*, 740 F.2d 1398, 1408 (7th Cir. 1984), cert. denied, 471 U.S. 1135 (1985); *Rybicki* v. *State Bd. of Elections*, 574 F. Supp. 1082, 1109 (N.D. Ill. 1982) (three-judge court).

Board] district," some districts in the Police Jury plan did not contain a single school. *Id.* at 73a (¶ 24). Where, as here, "the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached," a powerful inference of discrimination arises. *Arlington Heights*, 429 U.S. at 267 & n.17.

2. Board members' own statements of opposition to "black representation" and "drawing majority-black districts," J.S. App. 31a-32a; *id.* at 53a-54a, also show that the Board acted with a discriminatory purpose. Two Board members reported that others on the Board were "hostile" or "opposed" to the idea of black representation on the Board, or a majority-black School Board district. J.A. 93, 123; J.S. App. 31a-32a. A third, who represented a district that included portions of a predominantly black community that, if not divided, could comprise part of a black-majority district north of Bossier City, insisted that "he had worked too hard to get [his] seat and that he would not stand by and 'let [them] take his seat away from him.'" J.A. 124, 134; J.S. App. 53a, see page 11, *supra*.

The district court erred in its interpretation of those statements. J.S. App. 31a-32a. When all relevant evidence is taken into account, the statements clearly indicate, contrary to the district court's conclusion, a purpose to prevent "the presence of black persons as members of the School Board." *Id.* at 31a. The district court reasoned that opposition to "the intentional drawing of majority-black districts in order to ensure black representation on the Board" is "hardly an indication of discriminatory purpose unless section 5 imposes an affirmative obligation to draw additional [*sic*] majority-black districts." *Ibid.* Although the refusal to draw compact majority-black districts is not always probative of discriminatory intent, in the circumstances of this case the Board's avowed refusal to do so communicated a clear message of opposition to black representation. In circumstances where following traditional districting principles would lead to the drawing of majority-black districts,

purposefully avoiding drawing them is probative of racially discriminatory purpose. See, *e.g.*, *Garza* v. *County of Los Angeles*, 918 F.2d 763, 770-771 (9th Cir. 1990), cert. denied, 498 U.S. 1028 (1991); *Busbee*, 549 F. Supp. at 517. The Police Jury plan plainly disserved the Board's interests in incumbency protection and distribution of schools among districts. In the face of unquestioned evidence of dilution, of the Board's history of discrimination, of the suspect timing of the Board's decision to adopt the Police Jury plan, and of the Board's shifting justifications, the only plausible explanation for the Board's choice of the Police Jury plan was that the Board adopted that plan in order to dilute the effectiveness of black votes. Where, as here, the Board knew that failure to draw majority-black districts would perpetuate black vote dilution, its expressed opposition to doing so is evidence of its racially discriminatory purpose.

The district court concluded that "at least a majority of the white Board members were responsive to the black community and were not opposed to black representation on the School Board." J.S. App. 30a. In support of that conclusion, it pointed to only one fact—the Board's appointment of a black member, Jerome Blunt, to a vacant School Board post. *Ibid.* But that appointment was plainly a meaningless palliative. As Judge Kessler noted, "Mr. Blunt was appointed to represent a district that was only 11% black, and his short [six-month] tenure on the job was a stark reminder of the highly polarized voting in Bossier Parish." *Id.* at 54a n.9. (Blunt lost to a white challenger. *Id.* at 100a (¶ 105)). Moreover, the circumstances of Blunt's appointment were themselves suspicious—the appointment occurred "at the very meeting where the Board adopted a motion of intent to adopt the Police Jury plan." *Id.* at 54a n.9. From the circumstances, it appears that "the School Board appointed a black to fill a seat they knew he would be unable [to] hold, hoping to quell the political furor over the adoption of the Police Jury plan." *Ibid.* This Court has noted

that the ephemeral success of black candidates in such circumstances does not warrant the drawing of favorable inferences. See *Thornburg* v. *Gingles*, 478 U.S. 30, 75-76 & n.37 (1986).

C. The District Court Erred in Finding That the Board Had Any Legitimate, Nondiscriminatory Reason for Adopting the Police Jury Plan

The district court found that the Police Jury plan "offered the twin attractions of guaranteed preclearance and easy implementation (because no precinct lines would need redrawing)," and that those were legitimate nondiscriminatory reasons for adopting that plan. J.S. App. 27a-28a. Those factors were, however, not the Board's actual reasons, nor were they nondiscriminatory. The district court's conclusion that the Board acted for nondiscriminatory reasons was infected by the court's artificially restricted view of the relevant evidence, and was, in any event, clearly erroneous.

Any interest the Board had in "guaranteed preclearance" was simply a means of effectuating the Board's purposeful dilution of minority voting strength. The Board showed no concern at all with "guaranteed preclearance" until the local NAACP made clear that it would oppose preclearance of any plan that continued to shut out minority voters. As Judge Kessler noted, "[i]f guaranteed preclearance was what the Board wanted, it would have acted soon after the Police Jury Plan was precleared by the Justice Department on July 29, 1991," rather than waiting for more than a year to adopt that plan. J.S. App. 58a.

Moreover, the fact that the Police Jury plan had previously been precleared might have recommended it over other plans comprised exclusively of white-majority districts, but fails as a rationale for the Board's selection of the Police Jury plan over any less dilutive plan. The Board could not realistically have believed that a plan

that ameliorated the existing dilution would be *less* likely to receive preclearance than the Police Jury plan. "[G]uaranteed preclearance" was a plausible motivation for adopting the Police Jury plan only if the School Board was firmly intent on continuing to use a plan with *no* majority-black districts and it wanted assurance that it could do so without drawing an objection from the Attorney General. In short, "[t]he Police Jury plan only became 'expedient' when the School Board was publicly confronted with alternative plans demonstrating that majority-black districts could be drawn, and demonstrating that political pressure from the black community was mounting to achieve such a result." J.S. App. 49a.[16]

The prospect of "easy implementation (because no precinct lines would need redrawing)," J.S. App. 28a, also was not an actual, nondiscriminatory reason for the Board's adoption of the Police Jury plan that it initially had rejected. The court suggested that "the School Board entirely reasonably *could have*, when faced with the NAACP's plan, arrived quickly at the conclusion that zero precinct splits was significantly more desirable than 46," *id.* at 29a (emphasis added), but did not find that the Board actually reached such a conclusion. The correct focus in determining the purpose behind the adoption of the disputed plan is on the Board's *actual* purpose *at the time* it adopted that plan. *City of Pleasant Grove*, 479 U.S. at 470 (rejecting argument "developed after the fact"

[16] For similar reasons, the district court's view that the Board's adoption of a dilutive plan was "an understandable, if not necessarily laudable, retreat from a protracted and highly charged public battle," J.S. App. 34a, does not support its conclusion that such a retreat amounted to a nondiscriminatory reason for adoption of the Police Jury plan. The only "public battle" the School Board faced arose from black citizens' opposition to the strongly dilutive effect of any plan with exclusively white-majority districts, and the Board "retreat[ed]" from it by deliberately excluding black voters from any meaningful participation in the process. See *id.* at 58a n.12.

because it was "not the true basis" for decision); cf. *United States* v. *Virginia*, No. 94-1941 (June 26, 1996), slip op. 18 ("[A] tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded."); *id.* at 2-3 (opinion of Rehnquist, C.J., concurring).

The evidence shows that splitting precincts was simply never a concern for the Board during its redistricting process, but was only an excuse manufactured to justify its refusal to draw a non-dilutive plan. The Board had anticipated splitting precincts from the very beginning of the process. J.S. App. 29a, 95a (¶ 89). There is no finding that the Board ever considered the relative number of precinct splits, or their potential cost, as factors in selecting a plan. The Board did not ever "voice its concern about *too many* precinct splits causing higher election costs in its initial submission" for preclearance, nor did it "estimate[] the cost of splitting precincts before it voted to adopt the Police Jury plan." *Id.* at 57a. And the Board never considered measures that would have reduced the number of precinct splits in the NAACP plan. *Id.* at 100a-101a (¶ 106). Although the Board's cartographer and attorney asserted that the NAACP plan could not be considered because its "district lines crossed existing precinct lines, and therefore violated state law," *id.* at 99a (¶ 102), 6a, both those Board representatives knew at the time that they were free to request that the Police Jury realign the parish's precincts—a process that is both legal and common in Louisiana. *Id.* at 6a-7a, 99a-100a (¶ 102); see page 9, *supra*. They never approached the Police Jury to explore whether it was willing to take that step. *Ibid.*

The Board's proffered justifications of "guaranteed preclearance and easy implementation" were further rendered implausible by the fact that the Board raised them in conjunction with a number of other justifications that lacked credibility. As the district court acknowledged, "[i]n the

course of litigation, the School Board has offered several reasons for its adoption of the Police Jury plan that clearly were not real reasons." J.S. App. 27a n.15. The Board asserted, for example, that it had adopted the Police Jury plan to comply with this Court's decision in *Shaw* v. *Reno*, 509 U.S. 630 (1993)—a decision that was not rendered until almost nine months after the Board adopted the plan. J.S. App. 27a n.15. Other clearly pretextual reasons proffered by the Board included its stated desire to avoid voter confusion by adopting the same boundaries for the Police Jury and School Board districts. Pltff's Exh. 16 (Myrick testimony), at 4. The voter-confusion rationale was raised for the first time *post hoc*, in the Board's Section 5 submission, see J.S. App. 156a, and was not a genuine Board interest, given that (a) Louisiana jurisdictions commonly have different School Board and Police Jury districts; (b) the Board had had districts different from those of the Police Jury for more than a decade; and (c) the Board had not seriously considered adopting the same districts as the Police Jury until it was faced with the black community's request that it adopt a non-dilutive plan, see *id.* at 49a-50a, 72a (¶ 22). The fact that the Board has proffered shifting, insupportable justifications for its decision further supports a finding that it discriminated.[17]

Where "the record permits only one resolution of the factual issue" of intentional discrimination, reversal is appropriate. *Swint*, 456 U.S. at 292. As we have demonstrated, Judge Kessler was correct that, when all the relevant evidence is considered, the record "demonstrates

[17] See, *e.g.*, *Southwest Merchandising Corp.* v. *NLRB*, 53 F.3d 1334, 1344 (D.C. Cir. 1995); *EEOC* v. *Ethan Allen, Inc.*, 44 F.3d 116, 120 (2d Cir. 1994) (citing cases); see also *St. Mary's Honor Center* v. *Hicks*, 509 U.S. 502, 511 (1993) ("The factfinder's disbelief of the reasons put forward by the defendant (particularly if * * * accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination.").

conclusively that the Bossier School Board acted with discriminatory purpose." J.S. App. 39a. The judgment of the district court should be reversed and the case remanded for entry of a declaratory judgment that the appellee failed to meet its burden to show lack of discriminatory purpose under Section 5.

II. A PLAN THAT DILUTES MINORITY VOTING STRENGTH IN VIOLATION OF SECTION 2 OF THE VOTING RIGHTS ACT IS NOT ENTITLED TO PRECLEARANCE UNDER SECTION 5 OF THE ACT

It has long been established that retrogression in the voting strength of minority voters constitutes a discriminatory effect precluding preclearance under Section 5. See *Miller*, 115 S. Ct. at 2483; *City of Lockhart* v. *United States*, 460 U.S. 125, 134 (1983); *Beer* v. *United States*, 425 U.S. 130, 141 (1976). In *Beer*, 425 U.S. at 141, 142 n.14, the Court stated that a nonretrogressive but unconstitutionally dilutive voting change also violates Sections. In amending the Voting Rights Act in 1982, Congress, referring to that statement in *Beer*, indicated that vote dilution in violation of amended Section 2 should preclude preclearance under Section 5 as well: The Senate Judiciary Committee Report on the amendments stated that, "[i]n light of the amendment to section 2, it is intended that a section 5 objection also follow if a new voting procedure itself so discriminates as to violate section 2." S. Rep. No. 417, 97th Cong., 2d Sess. 12 n.31 (1982). Accordingly, the Department of Justice's regulations establishing procedures for the implementation of Section 5 provide that, even where a "submitted change is free of discriminatory purpose and retrogressive effect," the Attorney General nonetheless shall withhold preclearance where "a bar to implementation of the change is necessary to prevent a clear violation of amended Section 2." 28 C.F.R. 51.55(b)(2). Whether Congress viewed

vote dilution in violation of Section 2 as a prohibited discriminatory "effect" under Section 5, or, alternatively, as an equitable defense that should preclude a declaratory judgment under Section 5, Congress intended that such a violation should be a bar to preclearance.

1. a. Both Section 2 and Section 5 prohibit the discriminatory denial or abridgement of voting rights. Section 5 precludes preclearance of voting changes that will have the discriminatory "effect" of "denying or abridging the right to vote," and Section 2 prohibits the use of voting practices that "result[]" in a discriminatory "denial or abridgment of the right * * * to vote." It is well established that a showing of discriminatory purpose is not required in order to show either discriminatory "effect" or discriminatory "results." The similarity in meaning of the terms "effect" and "results" suggests that Congress viewed vote dilution that amounts to a discriminatory "result[]" under Section 2 as also constituting a prohibited discriminatory "effect" under Section 5. Especially in view of Section 5's purpose to prevent the perpetuation of discriminatory electoral systems by jurisdictions with a history of voting discrimination, *South Carolina* v. *Katzenbach*, 383 U.S. 301, 328 (1966), the bar on discriminatory "effect[s]" in Section 5 is most naturally read to incorporate the Section 2 prohibition on discriminatory vote dilution.

Reading Section 5 as prohibiting preclearance of voting changes that violate Section 2 is also supported by equitable principles governing declaratory judgments. Section 5 specifies a declaratory judgment action as the mechanism by which judicial preclearance may be obtained. See also 28 C.F.R. 51.52(a) (in determining whether to object to a proposed change, the Attorney General "shall make the same determination that would be made by the court in an action for a declaratory judgment"). The Declaratory Judgment Act provides that any federal court that otherwise has jurisdiction "*may* declare the rights and other legal relations of any interested party." 28

U.S.C. 2201 (emphasis added). The declaratory judgment remedy is "equitable in nature," and "equitable defenses may be interposed," *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 155 (1967), including one based on the principle that equity withholds its assistance from persons using the asserted right in a manner contrary to the public interest. *Morton Salt Co.* v. *G.S. Suppiger Co.*, 314 U.S. 488, 492-493 (1942); see *Wilton* v. *Seven Falls Co.*, 115 S. Ct. 2137, 2143 (1995) (district courts have "unique breadth of * * * discretion to decline to enter a declaratory judgment"); *Public Serv. Comm'n* v. *Wycoff Co.*, 344 U.S. 237, 241 (1952) (Declaratory Judgment Act "confers a discretion on the courts rather than an absolute right upon the litigant"); *Eccles* v. *Peoples Bank*, 333 U.S. 426, 431 (1948) ("A declaratory judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion, exercised in the public interest.").

Discriminatory vote dilution in violation of Section 2 is manifestly contrary to the public interest, and is thus an appropriate ground for denial of a declaratory judgment of preclearance. "Congress intended § 5 to have 'the broadest possible scope.'" *Morse* v. *Republican Party of Virginia*, 116 S. Ct. 1186, 1198 (1996) (opinion of Stevens, J.) (quoting *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 566-567 (1969)). It would be an "anomalous result"—one Congress plainly did not intend—if the preclearance requirement were no bar to "voting practices known to be illegal" under Section 2. *Morse*, 116 S. Ct. at 1201 & n.25 (opinion of Stevens, J.). Thus, preclearance should be denied to a voting change when it is known that the change will result in the unlawful dilution of minority voting strength, regardless of whether the change was instituted for a discriminatory purpose or had a retrogressive effect.

b. The question whether discriminatory vote dilution violates Section 5 first arose in *Beer* v. *United States*, 425

U.S. 130 (1976). In *Beer*, the Court stated that Section 5's prohibition of discriminatory effects sought principally "to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise," *id.* at 141; a nonretrogressive change could not violate Section 5, the Court concluded, "unless the [change] itself so discriminates on the basis of race or color as to violate the Constitution." *Ibid.* *Beer* cited the cases of discriminatory vote dilution as examples of non-retrogressive yet unconstitutional changes that would violate Section 5. 425 U.S. at 142 n.14 (citing, *inter alia*, *White* v. *Regester*, 412 U.S. 755 (1973)).

At the time *Beer* was decided, the Court's decision in *White* v. *Regester* established the standard for unconstitutional racial vote dilution. Under that standard, a plaintiff could prove unconstitutional vote dilution by demonstrating that "the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." 412 U.S. at 766. When this Court in *Beer* referred to a change that "itself so discriminates * * * as to violate the Constitution," it was referring to a change that violated *White* v. *Regester*'s vote dilution standards. See *Beer*, 425 U.S. at 141, 142 n.14 ("It is possible that a legislative reapportionment could be a substantial improvement over its predecessor in terms of lessening racial discrimination, and yet nonetheless continue so to discriminate on the basis of race or color as to be unconstitutional.") (citing, *inter alia*, *White* v. *Regester*, *supra*).

Because vote-dilution standards under the Constitution and Section 2 were generally coextensive at the time *Beer* was decided, *Beer*'s discussion meant that practices that violated Section 2 would not be entitled to preclearance

under Section 5. Subsequently, however, in *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980), the Court held that proof of discriminatory purpose was necessary to establish unconstitutional vote dilution. Concluding that *Bolden*'s purpose test put plaintiffs to an inappropriately difficult burden, Congress amended Section 2 in 1982 to codify, as the statutory standard for proving unlawful dilution, the discriminatory "results" test originally set forth in *White* v. *Regester*. See *Gingles*, 478 U.S. at 43-44. Amended Section 2 thus prohibits any practice "which results in a denial of abridgement" of the right to vote on the basis of race or color. 42 U.S.C. 1973(a). Tracking the language in *White* v. *Regester*, Section 2 provides that a violation will be established if "the political processes leading to nomination or election * * * are not equally open to participation by members of a [protected class] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. 1973(b). The 1982 amendments also extended Section 5's preclearance requirement, which was due to expire on August 8, 1982. Pub. L. No. 97-205, § 2(b)(4), 96 Stat. 133 (1982).

c. In enacting the 1982 amendments, Congress sought to reaffirm the principle, articulated in *Beer*, that a voting change that illegally dilutes minority voting strength is not entitled to preclearance under Section 5. The Senate Report to the 1982 amendments made that point explicit:

> Under the rule of *Beer* v. *United States*, 425 U.S. 130 (1976), a voting change which is ameliorative is not objectionable unless the change "itself so discriminates on the basis of race or color as to violate the Constitution." 425 U.S. at 141; *see also* 142 n.14 (citing to the dilution cases from *Fortson* v. *Dorsey*[, 379 U.S. 433 (1965),] through *White* v. *Regester*). In light of the amendment to section 2, *it is intended that a section 5 objection also follow*

> *if a new voting procedure itself so discriminates as to violate section 2.*

S. Rep. No. 417, 97th Cong., 2d Sess. 12 n.31 (1982) (emphasis added). The Senate Report is the "authoritative source" for determining Congress's intent in enacting those amendments. *Gingles*, 478 U.S. at 43 n.7. Congress thus approved *Beer*'s interpretation of the Act to require a denial of preclearance to changes that unlawfully dilute minority voting strength. It made clear its intention that that interpretation would apply to violations of the amended Section 2. See *Morse*, 116 S. Ct. at 1201 n.52 (opinion of Stevens, J.).[18]

The House Report to the amendments similarly concluded that a Section 2 violation should result in the denial of preclearance under Section 5:

> Under the Voting Rights Act, whether a discriminatory practice or procedure is of recent origin affects only the mechanism that triggers relief, i.e., litigation [under Section 2] or preclearance [under Section 5]. The lawfulness of such a practice should not vary depending on when it was adopted, i.e., whether it is a change.

H.R. Rep. No. 227, 97th Cong., 1st Sess. 28 (1981). The House Report "indicates that the substantive standards for § 2 and § 5 violations are the same, so long as the challenged practice represents a change from 1965 conditions" such that Section 5 is triggered. *Morse*, 116 S. Ct. at 1201 n. 25 (opinion of Stevens, J.). That result makes sense because, "[i]f § 5 were narrower than § 2, then a covered jurisdiction would not need to preclear changes in voting practices known to be illegal." *Id.* at 1201. Because Congress approved of this existing reading of Section 5, there was no reason to amend Section 5 in 1982.[19]

The legislative background thus establishes that changes that violate Section 2 are not entitled to preclearance. As this Court has ruled in interpreting the Voting Rights Act, "[w]hen a Congress that re-enacts a statute voices its approval of an administrative or other interpretation thereof, Congress is treated as having adopted that interpretation, and this Court is bound thereby." *United States* v. *Board of Comm'rs*, 435 U.S. 110, 134 (1978). The district court erred in ruling to the contrary.

d. Administrative and legislative actions after enactment of the 1982 amendments confirm that voting changes that dilute minority voting strength under Section 2 are not entitled to preclearance. In 1985, the Department of Justice issued the first set of proposed Section 5 regulations following the Act's amendment. See 50 Fed. Reg. 19,122. One of the proposed regulations (28 C.F.R. 51.56(c)(1)) required the Attorney General to withhold preclearance "based upon violation of Section 2." 50 Fed. Reg. at 19,131. As finally adopted, the Department's regulation requires that preclearance be withheld where "a bar to implementaton of the change

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[18] The Senate Report's reference to *Beer* also shows that Congress viewed vote dilution as a prohibited "effect" under Section 5. In a discussion focussing on Section 5's effects test, the *Beer* Court referred to a dilutive change as one that would not simply bar preclearance for equitable reasons independent of Section 5's terms, but that would "violate § 5" itself. While noting that an ameliorative change would not ordinarily "have the 'effect' of diluting or abridging the right to vote on account of race," the *Beer* Court concluded that an ameliorative change *would* have such an effect if it were unlawfully dilutive under the non-purpose-based *White* v. *Register* vote-dilution standard—the standard that the 1982 Congress reinstated in amended Section 2. *Beer*, 425 U.S. 141, 142 n.14.

[19] The Court has reserved the specific question whether a violation of amended Section 2 requires the denial of preclearance. *City of Lockhart* v. *United States*, 460 U.S. 125, 133 n.9 (1983) (referring to appellee Cano's argument); see also 81-802 Brief for Appellee Cano at 48-52, *Lockhart*, *supra*.

is necessary to prevent a clear violation of amended section 2." 28 C.F.R. 51.55(b)(2).[20]

Congress held oversight hearings on the proposed regulations, in which the Assistant Attorney General for Civil Rights testified in detail that Section 5 objections might be based on clear Section 2 violations. See *Proposed Changes to Regulations Governing Section 5 of the Voting Rights Act: Oversight Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. 149, 151-152 (1985) (*Oversight Hearings*) (statement of Wm. Bradford Reynolds). Witnesses noted that, not only had Congress in 1982 intended that Section 5 preclearance be denied on the basis of violation of Section 2, but that concerns of judicial and administrative economy also supported that construction. The facts relevant to vote dilution in violation of Section 2 are usually also relevant to purpose under Section 5. See, *e.g.*, *Johnson* v. *De Grandy*, 114 S. Ct. 2647, 2656-2657 & n.9 (1994) (Senate report [21] or "*Zimmer*" [22] factors relevant to Section 2

[20] The regulation authorizes the Attorney General to deny preclearance to prevent a "clear" violation of Section 2. 28 C.F.R. 51.55(b)(2) (J.S. App. 168a). The undisputed evidence in this case established such a clear Section 2 violation. The Court thus need not reach the question whether the "clear violation" standard applies in judicial proceedings. We note, however, that the preamble to the Department's final Section 5 regulation states that the "clear violation" standard was incorporated to account for the limitations inherent in the administrative preclearance process, including a 60-day time limit for making preclearance determinations, the lack of hearing procedures or subpoena power, and the absence of a formal record. 52 Fed. Reg. 487 (1987). Under such procedural limitations, it might not be possible to detect a violation unless it was clear from the submission.

[21] S. Rep. No. 417, 97th Cong., 2d Sess. 28-30 (1982).

[22] *Zimmer* v. *McKeithen*, 485 F.2d 1297 (5th Cir. 1973), aff'd *sub nom. East Carroll Parish School Bd.* v. *Marshall*, 424 U.S. 636 (1975).

vote dilution); *Rogers*, 458 U.S. at 620-622 (*Zimmer* factors relevant to purpose under Section 5); see also 52 Fed. Reg. at 487 ("the analysis used in the Section 5 preclearance process requires evaluation of precisely the same factors that Congress specified as being relevant to a determination under Section 2"). "To hold that section 2 is not fully applicable would mean that the section 2 issues would invariably have to be tried in another forum"—"a prescription for more litigation and a waste of the resources of the parties, the Department of Justice, and the courts." *Oversight Hearings* at 47 (testimony of Laughlin McDonald).

Following the oversight hearings, the House Judiciary Subcommittee on Civil and Constitutional Rights issued a report. The report expressly endorsed the Department's construction of Section 5 as authorizing objections on the basis of Section 2 violations:

> [T]he Subcommittee concludes that it is a proper interpretation of the legislative history of the 1982 amendments to use Section 2 standards in the course of making Section 5 determinations.

Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 99th Cong., 2d Sess., *Ser. No. 9, Voting Rights Act: Proposed Section 5 Regulations* 5 (Comm. Print 1986). Congress's failure to alter the enforcing agency's policy, after full review of that policy, "make[s] out an unusually strong case of legislative acquiescence in and ratification by implication of" the agency's position. *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 599, 601-602 (1983).

e. Particularly in light of the close congressional oversight, the Department's regulation is entitled to "great deference." *United States* v. *Board of Comm'rs*, 435 U.S. at 131-132. The district court, however, incorrectly refused to accord any deference to the Department's interpretation of the Act. It reasoned that deference is

inappropriate where the federal courts have concurrent authority to interpret a statute in the first instance, as they do under Section 5. J.S. App. 18a-19a (citing *Litton Fin. Printing Div.* v. *NLRB*, 501 U.S. 190, 203 (1991)). That reasoning is squarely contrary to this Court's long and consistent practice of deferring to the Attorney General's reasonable constructions of Section 5. See, *e.g.*, *Presley* v. *Etowah County Comm'n*, 502 U.S. 491, 508 (1992); *City of Pleasant Grove*, 479 U.S. at 468; *NAACP* v. *Hampton County Election Comm'n*, 470 U.S. 166, 178-179 (1985); *United States* v. *Board of Comm'rs*, 435 U.S. at 131-132.[23]

2. None of the reasons the district court gave supports its rejection of the clear congressional intent and consistent administrative construction establishing that changes violating Section 2 are not entitled to preclearance under Section 5.

The district court relied on the use of different terms—"results" in Section 2 and "effect" in Section 5—to conclude that the statutory text "unambiguous[ly]" rejected the principle that Section 5 preclearance can be denied based on a Section 2 violation. J.S. App. 17a-18a. Congress's use of different terms in the two sections is best explained, however, not as expressing a decision that Section 5 must tolerate unlawful vote dilution, but as indicating that retrogression is a discriminatory effect under Section 5, see *Beer*, 425 U.S. at 141, whereas retrogression, standing alone, is not a discriminatory "result" under Section 2, see *Johnson* v. *De Grandy*, 114 S. Ct. 2647, 2654-2657 (1994).[24]

[23] *Litton* did not hold otherwise. It held that it is inappropriate to defer to an agency's decision on a non-statutory matter that the courts normally have the primary power to determine, and that therefore lies outside the agency's area of special competence. 501 U.S. at 202 (noting that the NLRB's decision was "not grounded in terms of any need * * * 'to effectuate the policies of the Act,'" but rather was based on construction of a contract, for whose interpretation "'[a]rbitrators and courts are still the principal sources"). The Court reaffirmed in *Litton* that the NLRB's interpretations of statutory language were entitled to "substantial deference." *Id.* at 201-202.

The district court also noted that the allocation of the burden of proof differs under Section 5 and Section 2, and concluded that "[t]hat crucial procedural difference strongly suggests the inappropriateness of importing section 2 standards into section 5." J.S. App. 16a. The Court's language in *Beer*, however, suggests that the burden to show dilution as a bar to preclearance remains with the Attorney General. In noting that vote dilution can be a basis for denying preclearance, the Court stated that "[*t*]*he United States has made no claim* that [the disputed plan] suffers from any such disability, nor could it rationally do so." 425 U.S. at 142 n.14 (emphasis added). Thus, in ratifying *Beer*'s approach in the 1982 Voting Rights Act amendments, Congress likely contemplated that the United States bears the burden to make out a Section 2 claim as a basis for defeating preclearance, just as it ordinarily would as a plaintiff in Section 2 litigation. In addition, to the extent that the rule requiring denial of preclearance to unlawfully dilutive changes derives from the equitable public interest defense to a declaratory judgment action, that reasoning also would place the burden of proof of a Section 2 violation on the United States. The United States has, in practice, therefore assumed the burden to prove a Section 2 violation as a basis for denial of Section 5 preclearance.

Finally, the district court read this Court's decision in *Miller* as "repudiat[ing] the Department's interpretation of section 5," and as establishing that "section 5 and its standards have no place in a section 5 preclearance action." J.S. App. 21a, 23a. But *Miller* did not address

[24] Moreover, even if Section 5's "effect" language does not encompass nonretrogressive dilution, established equitable principles support denial of preclearance to unlawfully dilutive redistricting plans. See pages 34-35, *supra*.

the issue whether preclearance should be withheld on the basis of a Section 2 violation, for the Section 5 objection at issue there was based exclusively "on the ground that the submitted plans violated § 5's purpose element." *Miller*, 115 S. Ct. at 2492. As noted, *Miller* held that forbidden purpose could not be inferred from the jurisdiction's decision not to subordinate traditional districting principles so as to maximize the number of majority-minority districts. *Id.* at 2489-2490, 2492. But *Miller* did not hold that preclearance must be granted in the face of a Section 2 violation, *i.e.*, where racially polarized voting deprives minority voters of an equal opportunity to elect their chosen candidates, and it is possible to create "more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of their choice." *De Grandy*, 114 S. Ct. at 2655. Congress plainly did not intend that "anomalous result." *Morse*, 116 S. Ct. at 1201 & n.25 (opinion of Stevens, J.).

CONCLUSION

The judgment of the district court should be reversed and the case remanded for entry of a declaratory judgment that the redistricting plan at issue is not entitled to preclearance under Section 5. In the alternative, the judgment should be reversed and the case remanded for further proceedings to consider, under proper legal stan-

dards, the evidence concerning discriminatory purpose and dilutive effect.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

DEVAL L. PATRICK
Assistant Attorney General

PAUL BENDER
Deputy Solicitor General

CORNELIA T.L. PILLARD
Assistant to the Solicitor General

DAVID K. FLYNN
STEVEN H. ROSENBAUM
SAMUEL R. BAGENSTOS
Attorneys

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